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Federal Communications Commission
Office of the Secretary

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April 22, 1991

FILE

BY HAND DELIVERY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

Re: Comments of General Electric Capital Corporation on the Petition for Declaratory Ruling that Lenders May Take a Limited Security Interest in an FCC License.

Dear Ms Searcy:

Enclosed for filing are the original and four copies of the Comments of General Electric Capital Corporation on the Petition for Declaratory Ruling that Lenders May Take a Limited Security Interest in an FCC License.

Questions or correspondence with respect to this matter may be directed to the undersigned or Tom W. Davidson of this office.

Very truly yours,

Janet S. Crossen

JSC:vlb

Enclosures

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APR 2 2 1991

Federal Communications Commission
Office of the Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re:	)	
	)	
Petition for Declaratory Ruling	)	
that Lenders May Take a Limited	)	MMB File No. 910221A
Security Interest in an FCC License	)	

To: The Commission

COMMENTS OF GENERAL ELECTRIC CAPITAL CORPORATION

Tom W. Davidson
Margaret L. Tobey
Janet S. Crossen

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Federal Communications Commission
Office of the Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re:	)	
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Petition for Declaratory Ruling that Lenders May Take a Limited Security Interest in an FCC License	)))	MMB File No. 910221A

TO: The Commission

COMMENTS OF GENERAL ELECTRIC CAPITAL CORPORATION

General Electric Capital Corporation ("GECC"), by its attorneys and pursuant to the Public Notice issued by the Federal Communications Commission (the "Commission" or "FCC") on March 15, 1991, hereby submits its comments with respect to the Petition for Declaratory Ruling that Lenders May Take a Limited Security Interest in an FCC License (the "Petition") filed on February 21, 1991, by Hogan & Hartson.

I. INTRODUCTION AND SUMMARY

The Petition asks the Commission to overturn its long-standing policy that a license issued by the Commission cannot be hypothecated by pledge, mortgage, lien or any other such security device and to rule that lenders may take a limited security interest in an FCC license. According to the Petition, such a change in the law is feasible because the Commission's policy forbidding the grant of a security interest in an FCC license is not required by the Communications Act of 1934, as amended (the

"Act"), or, indeed, by any established and reasoned Commission rule or policy but, in fact, derives from a misreading of Sections 301, 304 and 309(h) of the Act. Petition at 7 and 12. Moreover, the Petition argues that such a change is necessary to provide sufficient incentives to lenders to make loans to Commission licensees given the current marketplace where station values are decreasing in many places and station bankruptcies are increasing. Petition at 3. The Petition illustrates the significance of the trouble faced by a secured lender without a security interest in an FCC license by referring to a recent bankruptcy decision where the court held that the assets of a broadcast station, absent its FCC license, could not be valued on a going concern basis.[1] Petition at 4.

GECC, a financial services company, is a major lender serving the media and communications segments of the business community. During the past few years, GECC has funded several billion dollars to companies engaged in the fields of entertainment, publishing, broadcasting and cable. GECC thus is very familiar with the financial industry generally and the special issues facing lenders in transactions involving Commission permittees and licensees. A lender's inability to

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[1] In Oklahoma City Broadcasting Co., 112 B.R. 425 (Bankr. W.D. Okla. 1990), the bankruptcy court held that because the lender's security interest in all of the assets of a broadcast station did not extend to the debtor's FCC license, the lender's priority over subordinated and unsecured creditors was limited to the amount that could be realized in a liquidation sale of the debtor's assets (absent the license) as opposed to an amount equal to the value of the broadcast station sold as a going concern.

take a security interest in a borrower's FCC license has exacerbated the difficult investment market and plays a substantial role in inhibiting lending to broadcast and communications facilities by an already generally skittish financial investment community, especially given less risky alternatives for investors. As noted in the Petition, there is a "virtual paralysis in broadcast lending today" (Petition at 2). GECC thus supports the Petition and urges the Commission to issue a declaratory ruling that lenders may take a limited security interest in an FCC license. However, as GECC explains below, such a ruling is not likely to be adequate to result in a recommitment by lenders of substantial capital to the communications industry. In order for the necessary incentives to exist, the Commission must undertake a thorough examination of its prior approval requirements for lenders facing loan defaults and modify its rules and procedures to enable lenders to effectuate transfers of control and assignments expeditiously and without interference by defaulting debtors when foreclosure is indisputably appropriate.

II. A LENDER SHOULD BE PERMITTED TO OBTAIN A SECURITY INTEREST IN A COMMISSION LICENSE.

GECC urges the Commission to modify its policies to permit a creditor to obtain a security interest in an FCC license. Such an interest would not represent an interest in the licensed frequency in contravention of Sections 301, 304 and 309 of the Communications Act of 1934, as amended (the "Act").

Petition at 12-14. Nor would such a grant interfere with the Commission's interest in protecting its authority over the qualifications and actions of a licensee. The mere grant of a security interest would not effect any automatic transfer of the license. Following a default by the debtor, any transfer of the license from the debtor to the creditor (or a third party) still would be subject to the Commission's prior approval requirement under Section 310(d) of the Act. Petition at 23. The fact that the creditor has a security interest in the FCC license will in no way influence or affect the FCC's freedom to approve or disapprove any such transfer. In short, the debtor cannot give a secured lender any greater rights than the debtor has in collateral pledged to secure a loan. Therefore, permitting lenders to take security interests in FCC licenses would not impact negatively on essential principles embodied in the Act.

Indeed, permitting a lender to take a security interest in an FCC license will have no other effect than to put the lender in an economic position more in line with the economic risk it takes in lending to an FCC licensee amounts of money far in excess of the liquidation value of the communication facility absent the license. As the holder of a security interest in 100 percent of a communications facility's assets and not merely those physical assets that represent but a small portion of such facility's value, the secured lender would have a role in the bankruptcy proceedings commensurate with its economic investment. In addition, the lender with a security interest in all of the assets of a communications facility, including the FCC license, would escape the devastating results faced by the creditor in Oklahoma City Broadcasting. If the Commission reverses its prior decisions and changes the law in this respect, the Commission will have made substantial progress toward easing the current financing crisis in the communications lending market by affording lenders greater comfort to resume financing business transactions involving Commission licensees.

Although a positive ruling by the Commission that a lender can take a security interest in an FCC license will go a long way toward reducing the reluctance of lenders to enter financing transactions with FCC licenses, it is not enough. Equally troubling to GECC, especially in light of the large number of financially precarious or bankrupt communications facilities, are the problems that result when a debtor in default uses the requirement of FCC approval prior to consummation of the transfer or assignment of FCC-licensed communications facilities for such debtor's private gain. As more thoroughly described below, the delays, expenses and risks inherent in the FCC's prior approval process combined with the necessity of cooperation between the debtor and lender in order to obtain the required FCC consent are seized upon by defaulting debtors and used as levers for their private benefit to the detriment of innocent creditors and ultimately the public. GECC submits that the Commission must also address the particular difficulties facing creditors involved in workouts with defaulting or financially troubled debtors who use the FCC's prior approval requirements as a shield to prevent constructive and inevitable restructurings intended to revitalize the failing communications facility to the benefit of the public.[2]

III. UNDER CURRENT LAW, DEFAULTING FCC LICENSEE-DEBTORS USE THE TRANSFER APPLICATION SIGNATURE REQUIREMENT AS A SHIELD TO DELAY AND IMPEDE THE EFFECTUATION OF VOLUNTARY CREDITOR/ DEBTOR WORKOUTS IN CONTRAVENTION OF COMMISSION POLICY AND CUSTOMARY FINANCE PRACTICES.

Lenders make loans secured by a pledge of the stock and a security interest in the assets of the debtor with the expectation that if the debtor defaults on its obligations, the lender will have the rights set forth in the Uniform Commercial Code and the relevant loan and security documents.[3] The ability of the lender to act quickly when the debtor is in dire financial straits can be critical to preserving the value of the collateral and enabling the lender to minimize its losses. When FCC

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[2] The Commission has long supported increased minority participation and ownership in the broadcast industry and has previously acknowledged that obtaining financing is an immense obstacle to minorities' entrance and establishment in the communications industry. Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 99 F.C.C.2d 1249 (1985). Thus, to the extent the Commission's action in response to the Petition and these comments calms the crisis in the communications industry lending market, the Commission will be furthering another important policy, i.e., increasing minority participation and ownership in the communications industry.

[3] The secured lender, in the event of such default, would have extensive powers over the collateral pledged to secure the loan including the power to take over the debtor's business, vote pledged shares of stock and sell the collateral (which may consist of an entire business) at a public or private sale. See generally Article 9 of the Uniform Commercial Code and specifically §§ 9-501, 9-503 and 9-504.

licensees default on their loan obligations, unlike ordinary commercial transactions, the lender cannot exercise its rights under the UCC or loan documents by foreclosing on the assets and taking over the business or by immediately selling the station as a going concern because of the requirement of prior FCC approval for the change in control. That requirement is, of course, known to the lender prior to entering into the transaction and is not challenged in any way.

Problems arise, however, when defaulting FCC licensee-debtors use the prior approval process for their personal financial benefit to the detriment of innocent creditors and ultimately the public. In many cases the optimum, and sometimes only, way to address the debtor's financial difficulties is for control of the licensee's facilities to be transferred to the creditor or to a third party that has sufficient resources to satisfy the debtor's obligations to the creditor and otherwise return the troubled station to viable operations. The failure to expeditiously effect such a transfer may cause the irreversible depletion of the debtor's assets to the detriment of the lender, particularly since financially troubled operations generally are being mismanaged by the debtor.

Before any such assignment or transfer of control of an FCC-licensed communications facility can take place, however, the Act mandates that the defaulting debtor and proposed assignee or transferee must submit an application to the Commission seeking

FCC consent to a license assignment or transfer of control of the debtor. 47 U.S.C. § 310(d). Because such transfers or assignments generally are subject to the Commission's 30-day public notice and petition to deny procedures, it typically takes 60 to 90 days to obtain the required prior FCC approval to effectuate such an assignment or transfer of control. Such delay always impedes, and in many circumstances, eliminates the possibility of an expeditious voluntary workout.

The problems for a secured creditor arising out of the FCC's present prior approval procedures are aggravated further by the fact that the transfer application to be filed with the FCC must be reviewed and signed by both the debtor and the assignee/transferee. Thus, the cooperation of the defaulting debtor is essential in the preparation and submission of such application. If the debtor refuses to cooperate, it is necessary for the lender to obtain a court order compelling the debtor's cooperation. If the debtor disregards the court order and continues to refuse to cooperate, the lender must return to court and seek a further order appointing a third party to act in the debtor's behalf.[4] Clearly, the necessity of obtaining such court orders will further delay and add to the costs of any transfer of control. Even in situations where debtors are apparently cooperative, the prior approval requirement, in effect, gives the defaulting debtor such an inordinate amount of

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[4] See Arecibo Radio Corporation, 101 F.C.C.2d 545 (1985); Mid-Ohio Communications, Inc., 90 F.C.C.2d 114 (1982); Peace Broadcasting Corp., 36 F.C.C.2d 675 (1972).

bargaining power that it can delay restructuring for many months and even years.[5] In fact, the debtor's bargaining position is sometimes so substantial that the debtor is able to extract significant sums of money from creditors to secure cooperation in executing the transfer application. Such delay, expense and uncertainty in many cases substantially narrow the range of workout options available to the creditor.

The Commission has previously recognized in the tender offer/proxy contest setting that it is not in the public interest for its administrative procedures to be utilized by parties for their private benefit to the detriment of others.[6] Likewise, the Commission's processes should not be used to modify the balance of power in a private dispute, such as a commercial lending transaction between a creditor and debtor, that does not involve issues within the province of the FCC. The Commission should remain neutral in such disputes and its processes also must be

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[5] GECC, for example, completed a workout in 1991 with one defaulting FCC licensee-debtor that was initiated in 1988. GECC believes that if some type of mechanism or procedure addressing the problem of the uncooperative debtor had been available and utilized by GECC in 1988, the workout would have been completed substantially sooner. The benefits to the public of a shorter workout period would have been earlier restoration of full service from the debtor's troubled communications facilities and the availability of more funds for additional communications industry lending by GECC.

[6] The Commission has stated that "it is not in the public interest for its administrative processes to be utilized, either by design or by unintended result, in a manner which favors either the incumbent or challenger in disputes over corporate control." In re Tender Offers and Proxy Contests, 59 R.R.2d 1536 (1986) (the "Tender Offer Policy Statement").

neutral.[7] Thus, the Commission should not permit a defaulting debtor to utilize the FCC's prior approval requirement (and the need for the debtor's cooperation necessitated by such requirement) as a means to interfere with or undermine a secured creditor's rights under loan documents and the Uniform Commercial Code. The ability of a debtor to use the FCC's prior approval requirement to delay the foreclosure process places a substantial burden on commerce and may jeopardize the ultimate financial viability of the licensed entity.

IV. THE COMMISSION SHOULD INITIATE A RULEMAKING PROCEEDING TO ADDRESS THE IMBALANCE OF POWER EFFECTED BY A DEBTOR'S USE OF THE PRIOR APPROVAL REQUIREMENT FOR ITS PRIVATE GAIN.

GECC urges the Commission to utilize the opportunity to review the issue presented by the Petition to initiate a general rulemaking proceeding to consider how its assignment and transfer of control requirements could be modified to eliminate the imbalance that occurs when a defaulting debtor uses the prior approval requirement for private gain to the detriment of the public. Such a separate proceeding is necessary because even a grant of the relief sought in the Petition will not affect the power imbalance between debtors and secured creditors resulting solely from the Commission's current prior approval requirements. Until this problem is adequately addressed by the FCC, sufficient incentives will not exist for the massive and necessary recommitment of capital to the communications industry by the

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7 <u>See</u> Tender Offer Policy Statement at ¶6.

financial investment community. GECC has been involved in a number of major workouts in communications transactions in recent years and is particularly well positioned to assist the Commission in any rulemaking proceeding initiated to examine its prior approval requirements from the perspective of debtors/creditors facing or involved in workouts of loan defaults.

While GECC does not believe it relevant or appropriate in the context of these comments to address the various approaches the FCC could employ to ensure neutrality in the applicability of its prior approval requirements, GECC believes it instructive to provide one example of how the Commission could modify its procedures, consistent with the Act, to constructively address this power imbalance. Thus, for example, the Commission could go a long way toward neutralizing the impact of its prior approval requirements by simply broadening its existing definition of "legal disability" for purposes of establishing the applicability of its "short form" prior approval procedures. Currently, expedited, and sometimes after the fact, FCC pro forma approval on the FCC's "short form" application is appropriate in the case of involuntary transfers of control or assignments.[8] Under existing FCC law, an involuntary assignment or transfer

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[8] Such transfers of control and assignments are not subject to the FCC's minimum 30-day waiting period or the formal petition to deny procedures. Under certain circumstances, prior approval is not required to consummate such involuntary transactions although the FCC's approval must be sought expeditiously after the transfer is consummated.

exists upon either the death or "legal disability" of a licensee or a person directly or indirectly in control of a licensee. D.H. Overmyer Telecasting Co., 94 F.C.C.2d 117 (1983). If the Commission broadened its definition of "legal disability" to include a formal acknowledgement of the debtor's default and the creditor's right under state law to repossess the collateral, the imbalance created by the FCC's prior approval requirements would be reduced.[9] GECC submits that once a debtor has defaulted on its obligations to a creditor and the creditor has the right under state law to take over, sell or otherwise dispose of the debtor's business, the debtor is disabled from dealing with the assets of its communications facility as its own. The Commission should recognize that such restrictions upon the licensee's actions with respect to its assets constitute as pervasive a disability as when a licensee's facilities are taken over by a receiver or bankruptcy trustee. Upon such determination of default, the debtor should be treated as "legally disabled" with regard to its ability and right to control the assets. As in the case of all pro forma involuntary transfers, only after the fact "short form" FCC approval would be required. Thus, prior FCC approval would not be required to effectuate such a transfer and the debtor's cooperation would not be required to sign or

[9] "Legal disability" presently is interpreted by the FCC to exist whenever the licensee no longer has any right of independent action and all of its actions are subject to the control of a court-appointed and supervised officer. See D.H. Overmyer Telecasting Co., 94 F.C.C.2d 117 (1983). Thus, a "legal disability" exists in the case of the appointment of a trustee or receiver under state creditor-debtor laws, the appointment of a trustee under the U.S. Bankruptcy Code or the conversion of the licensee to a debtor-in-possession under the Bankruptcy Code.

otherwise prepare a transfer application. Such a procedure would, of course, eliminate the delays caused by debtors' misuse of the prior approval requirement to the detriment of innocent creditors and ultimately the public. Under this approach, the creditor would act, as does the receiver or bankruptcy trustee, as a temporary or transient holder pending transfer to the ultimate transferee (which could be the creditor) following consideration of its qualifications by the Commission through the "long form" application process.

GECC recognizes that an examination of the efficacy of its prior approval requirements goes well beyond the scope of the Petition. Moreover, such a revision in rules applicable to workout situations must be carefully considered and refined based on a full record developed from comments from all interested and affected parties. It thus would be inappropriate for the Commission to consider this issue within the context of the instant proceeding. GECC urges the Commission to acknowledge the problems caused by a debtor's ability to use the prior approval requirement for private gain to the detriment of innocent creditors and the public by initiating a rulemaking proceeding to examine means to address such problems so that the financial community will have the security and stimulus it needs to increase its lending commitment to the communications industry.

IV. CONCLUSION

Because it is impossible to take a security interest in an FCC license, lenders run substantial risks in lending transactions with FCC licensees and have, especially recently, been less willing to lend to borrowers in the communications industry. This fact has contributed greatly to the current crisis in the communications lending market. The Commission thus should overturn its policy against pledging FCC licenses as collateral for loans. Changing the law in this respect is, however, not enough to cure the ailing communications industry lending market. The Commission must also recognize that FCC licensee-debtors are able unfairly to utilize the Commission's transfer of control requirements for personal gain and to impede orderly financial transactions in contravention of Commission policy and Rules and standard financial practice. The Commission should therefore initiate a rulemaking proceeding to consider various approaches to solve this problem. In such a proceeding GECC would rely on its considerable experience in communication workouts to recommend certain modifications in the FCC's rules and procedures to neutralize the effect of the FCC's prior approval procedures. Because of the magnitude and significance of this issue and the narrow scope of the pending Petition, a rulemaking proceeding is the most appropriate forum in which to consider and rectify this problem.

Respectfully submitted,

GENERAL ELECTRIC CAPITAL CORPORATION

By: ______________________

Tom W. Davidson
Margaret L. Tobey
Janet S. Crossen

Its Counsel

Dated: April 22, 1991

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CERTIFICATE OF SERVICE

I, Margaret Winebrenner, do hereby certify that a copy of the foregoing "Comments of General Electric Capital Corporation" was mailed by first class mail, postage prepaid, this 22nd day of April, 1991, to the following:

Marvin J. Diamond
Gardner F. Gillespie
Susan Wing

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Margaret A. Winebrenner

Margaret A. Winebrenner